

1 MARK R. WEINSTEIN (193043)
(mweinstein@cooley.com)
2 ANDREW MACE (284484)
(amace@cooley.com)
3 COOLEY LLP
3175 Hanover Street
4 Palo Alto, CA 94304-1130
Telephone: (650) 843-5000
5 Facsimile: (650) 849-7400

6 Attorneys for Defendant
FACEBOOK, INC.
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9 **UNITED STATES DISTRICT COURT**
10 **NORTHERN DISTRICT OF CALIFORNIA**
11 **SAN JOSE DIVISION**

12 BARRETT J. GAY,
13 Plaintiff,
14 v.
15 FACEBOOK, INC.,
16 Defendant.

Case No. 16-cv-03013-NC

**DEFENDANT FACEBOOK, INC.'S
ANSWER TO PLAINTIFF'S
COMPLAINT FOR COPYRIGHT
INFRINGEMENT**

JURY TRIAL DEMANDED

Defendant Facebook, Inc. (“Facebook”) hereby files its answer and affirmative defenses (“Answer”) to the Complaint for Copyright Infringement (“Complaint”) filed on June 3, 2016 by plaintiff Barrett J. Gay (“Plaintiff”). Each of the paragraphs below corresponds to the same-numbered paragraphs in the Complaint. Facebook denies all allegations in the Complaint, whether express or implied, that are not specifically admitted below. Facebook further denies that Plaintiff is entitled to the relief requested in the Complaint, or to any other relief.

NATURE OF THE CASE

1. Facebook lacks sufficient information to admit or deny Plaintiff’s allegations that “Photo sharing is the number one form of user engagement for Facebook” and that “it garners more ‘Likes’ than any other shared content” because these statements contain insufficient information to admit or deny. Facebook admits that on or about June 19, 2013, a feature for users to reply to a post with an image was released on Facebook’s web and mobile sites. Facebook denies that this feature is or was substantially similar to Plaintiff’s allegedly “copyrighted web only script.” Facebook denies that users could only reply to a post with text before this feature was released. Facebook admits that Plaintiff appears to have sent in 2013 via Facebook’s paid messaging system a message addressed to Mr. Chris Cox, Facebook’s then-Vice President of Product. Except as expressly admitted or denied, Facebook denies the allegations contained in Paragraph 1.

2. Facebook admits that it was or is involved in the lawsuits identified in Paragraph 2. Except as expressly admitted, Facebook denies the allegations contained in Paragraph 2.

JURISDICTION AND VENUE

3. Facebook admits that it does business in the State of California, including within the Northern District of California. To the extent that the remaining allegations contained in Paragraph 3 are not conclusions of law, to which no response is required, Facebook lacks sufficient information to admit or deny and on that basis denies the remaining allegations in Paragraph 3.

THE PARTIES

4. Facebook admits that its principal place of business is located at 1601 Willow Road, Menlo Park, California. Facebook admits that, as of April 2016, Facebook had over a billion “Daily Active Users” and 1.64 billion “Monthly Active Users” worldwide. Except as expressly admitted,

1 Facebook lacks sufficient information to admit or deny and on that basis denies the allegations
2 contained in Paragraph 4.

3 **ALLEGED “FACTS COMMON TO ALL CLAIMS AND HOW PLAINTIFF WOULD HAVE**
4 **BENEFITTED FROM HIS ORIGINAL WEB-BASED PHOTO-COMMENT”**

5 5. Facebook admits that it reported, as of April 2016, approximately 894 million
6 “Mobile-Only Monthly Active Users” and 1.654 billion “Monthly Active Users.” Facebook admits
7 that it acquired Instagram in the year 2012. Except as expressly admitted, Facebook lacks sufficient
8 information to admit or deny and on that basis denies the allegations contained in Paragraph 5.

9
10 **ALLEGED “HOW DEFENDANT BENEFITS FROM PHOTO-SHARING AND**
11 **UNAUTHORIZED USE/ADAPTATIONS OF PLAINTIFF’S PHOTO-COMMENT**
12 **COPYRIGHTED WORK”**

13 6. Facebook admits that it acquired Instagram in the year 2012. Facebook admits that
14 on or about June 19, 2013, a feature for users to reply to a post with an image was released on
15 Facebook’s web and mobile sites. Facebook denies that this feature is or was substantially similar to
16 Plaintiff’s allegedly copyrighted “web-based source code/demo.” Facebook admits that Plaintiff
17 appears to have sent in 2013 via Facebook’s paid messaging system a message addressed to Mr.
18 Chris Cox, Facebook’s then-Vice President of Product. Facebook denies that it deleted or concealed
19 any messages sent by the Plaintiff. Facebook admits that Mr. Cox, as of October 2016, is
20 Facebook’s Chief Product Officer. Except as expressly admitted or denied, Facebook lacks
21 sufficient information to admit or deny and on that basis denies the allegations contained in
22 Paragraph 6.

23 7. Facebook admits that various web sites noted on or about June 19, 2013 the release of
24 a feature for Facebook users to reply to a post with an image. Facebook admits that it reported in
25 2013 that over 350 million photos are uploaded every day on average. Facebook admits that, on or
26 about October 2013, a feature was added to Facebook’s iOS app for users to reply to a comment
27 with an image. Facebook admits that, on or about March 2014, a feature was added to Facebook’s
28 Android app for users to reply to a comment with an image. Except as expressly admitted or denied,
Facebook lacks sufficient information to admit or deny and on that basis denies the allegations

1 contained in Paragraph 7.

2 **DEFENDANT’S ALLEGED INFRINGING SITE AND MOBILE APPLICATIONS (“APPS”)**

3 8. Facebook admits that it operates a website at “facebook.com” and provides mobile
4 applications. Facebook admits that it had, as of April 2016, approximately 894 million “Mobile-Only
5 Monthly Active Users.” Except as expressly admitted or denied, Facebook denies the allegations
6 contained in Paragraph 8.

7 9. Facebook admits that a feature released on Facebook’s web and mobile sites on or
8 about June 19, 2013 permits one image to be uploaded per comment reply. Facebook lacks
9 sufficient information to admit or deny Plaintiff’s allegations that this feature can be disabled.
10 Facebook lacks sufficient information to admit or deny Plaintiff’s allegations regarding its allegedly
11 copyrighted work and on that basis denies them. Facebook admits that for certain versions and
12 under certain circumstances users can provide more than one photo in connection with a post and/or
13 message. Except as expressly admitted or denied, Facebook denies the allegations contained in
14 Paragraph 9.

15 10. Facebook admits that under certain circumstances and certain versions of the
16 Facebook website, that for certain types of ads, advertisers can be billed based in part on user
17 interaction with their ads. Except as expressly admitted or denied, Facebook denies the allegations
18 contained in Paragraph 10.

19 11. Facebook admits that a feature for users to reply to a post with an image is available
20 to Facebook users. Facebook admits that, as of April 2016, Facebook had over 1.65 billion
21 “Monthly Active Users” worldwide. Except as expressly admitted or denied, Facebook denies the
22 allegations contained in Paragraph 11.

23 12. Facebook admits that in September 2014, Plaintiff appears to have placed a report
24 using a copyright report form and to have been sent an automated message in response. Facebook
25 admits that in September 2014, Plaintiff appears to have been sent a message that his report was
26 being looked into. Facebook admits that Plaintiff appears to have attempted to email various
27 departments within Facebook. Except as expressly admitted or denied, Facebook lacks sufficient
28 information to admit or deny and on that basis denies the allegations contained in Paragraph 12.

13. Denied.

PLAINTIFF'S CLAIMS FOR RELIEF

14. Facebook refers to and incorporates its responses set forth above to each and every allegation in Paragraphs 1-13 as if fully set forth herein.

15. Facebook denies that it copied, implemented and/or released Plaintiff's allegedly copyrighted material. Facebook denies that it infringes or infringed Plaintiff's allegedly copyrighted material. Except as expressly admitted or denied, Facebook lacks sufficient information to admit or deny and on that basis denies the allegations contained in Paragraph 15.

16. Facebook lacks sufficient information to admit or deny the allegations contained in Paragraph 16 and on that basis denies them.

17. Denied.

18. Denied.

19. Denied.

20. Facebook lacks sufficient information to admit or deny Plaintiff's allegation that a feature for users to reply to a post with an image can be disabled. Facebook denies the remaining allegations contained in Paragraph 20.

21. Denied.

ANSWER TO PLAINTIFF'S PRAYER FOR RELIEF

Facebooks denies that Plaintiff is entitled to any relief whatsoever from Facebook, as prayed for or otherwise.

AFFIRMATIVE DEFENSES

Without altering any applicable burdens of proof, Facebook alleges the following affirmative defenses:

FIRST AFFIRMATIVE DEFENSE

Plaintiff fails to state a claim upon which relief can be granted.

SECOND AFFIRMATIVE DEFENSE

Each of Plaintiff's claims is barred by the doctrines of waiver, estoppel, unclean hands and/or laches.

THIRD AFFIRMATIVE DEFENSE

Each of Plaintiff's claims is barred, in whole or in part, because Facebook's alleged actions come within the doctrine of fair use and/or de minimis copying of protectable elements, if any.

FOURTH AFFIRMATIVE DEFENSE

Each of Plaintiff's claims is barred, in whole or in part, because Plaintiff's alleged copyrighted work lacks originality.

FIFTH AFFIRMATIVE DEFENSE

Each of Plaintiff's claims is barred, in whole or in part, because Plaintiff's alleged copyrighted work constitutes nothing more than unprotectable scène à faire.

SIXTH AFFIRMATIVE DEFENSE

Each of Plaintiff's claims is barred, in whole or in part, because Plaintiff lacks standing to bring this action.

SEVENTH AFFIRMATIVE DEFENSE

Each of Plaintiff's claims is barred, in whole or in part, because the accused work was independently created without reference to Plaintiff's allegedly copyrighted work.

EIGHTH AFFIRMATIVE DEFENSE

Each of Plaintiff's claims is barred, in whole or in part, for failing to join indispensable parties.

NINTH AFFIRMATIVE DEFENSE

Each of Plaintiff's claims is barred, in whole or in part, because Plaintiff is not the owner of the allegedly copyrighted work.

TENTH AFFIRMATIVE DEFENSE

Each of Plaintiff's claims is barred, in whole or in part, because Plaintiff's allegedly copyrighted work was not accessible and/or accessed by Facebook and/or Plaintiff's allegedly copyrighted work is not substantially similar to the accused work.

ELEVENTH AFFIRMATIVE DEFENSE

Plaintiff's prayer for injunctive relief is barred because Plaintiff has not suffered any irreparable injury, Plaintiff has an adequate remedy at law, and injunctive relief would be contrary to

the public interest.

TWELFTH AFFIRMATIVE DEFENSE

Plaintiffs' prayer for statutory damages and attorney's fees under the Copyright Act is barred to the extent the copyrights in issue do not meet the registration requirements of the Copyright Act, including 17 U.S.C. § 412(2).

THIRTHEENTH AFFIRMATIVE DEFENSE

Each of Plaintiff's claims is barred, in whole or in part, because Defendants have an express and/or implied license, and/or the alleged copyrighted work is in the public domain.

OTHER AFFIRMATIVE DEFENSES

Facebook reserves all other affirmative defenses pursuant to Rule 8(c) of the Federal Rules of Civil Procedure, the Copyright Laws of the United States, and any other defenses, at law or in equity, that now exist or in the future may be available based on discovery and further factual investigation in this case.

FACEBOOK'S PRAYER FOR RELIEF

WHEREFORE, Facebook prays this Court enter judgment:

A. In favor of Facebook and against Plaintiff, thereby dismissing Plaintiff's Complaint in its entirety, with prejudice, with Plaintiff taking nothing by way of its claims;

B. That Plaintiff pay all costs incurred by Facebook in this action, including costs and attorneys' fees recoverable pursuant to 17 U.S.C. § 505; and

C. Awarding Facebook all other relief the Court deems just and proper.

JURY DEMAND

Facebook respectfully requests a trial by jury on all issues so triable.

1 Dated: November 2, 2016

COOLEY LLP

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3
4 /s/ Mark R. Weinstein

5 Mark R. Weinstein
6 Attorneys for Defendant
7 FACEBOOK, INC.
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PROOF OF SERVICE
(FRCP 5)

I am a citizen of the United States and a resident of the State of California. I am employed in Santa Clara County, State of California, in the office of a member of the bar of this Court, at whose direction the service was made. I am over the age of eighteen years, and not a party to the within action. My business address is Cooley LLP, 3175 Hanover Street, Palo Alto, California 94304-1130. On the date set forth below I served the documents described below in the manner described below:

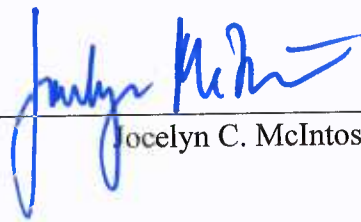
**DEFENDANT FACEBOOK, INC.'S ANSWER TO PLAINTIFF'S
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☒ (BY U.S. MAIL) I am personally and readily familiar with the business practice of Cooley LLP for collection and processing of correspondence for mailing with the United States Postal Service, and I caused such envelope(s) with postage thereon fully prepaid to be placed in the United States Postal Service at Palo Alto, California.

on the following part(ies) in this action:

Barrett J. Gay
5329 Riverwalk Drive
Building 1-A
Atlanta, GA 30349

Executed on November 2, 2016, at Palo Alto, California.



Jocelyn C. McIntosh